IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA	:	
	:	
	:	
v.	:	**CR-06-03ML**
	:	
	:	
JAMAL NORTHUP	:	

GOVERNMENT'S OPPOSITION TO
THE DEFENDANT'S MOTION TO SUPPRESS

The United States of America hereby opposes the defendant's motion to suppress, for the reasons set forth in the accompanying memorandum of law.

Respectfully submitted,

UNITED STATES OF AMERICA

By its Attorneys,

ROBERT CLARK CORRENTE
United States Attorney

PETER F. NERONHA
Assistant U.S. Attorney

March 10, 2006

Certificate of Service

I hereby certify that on the 10th day of March 2006, I caused a copy of the within "Government's Opposition to Defendant's Motion To Suppress" to be served on Kevin J. Fitzgerald, Esq., Assistant Federal Defender, 10 Weybosset Street, 3rd Floor, Providence, RI, 02903.

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GOVERNMENT'S MEMORANDUM OF LAW
IN OPPOSITION TO THE DEFENDANT'S MOTION TO SUPPRESS

INTRODUCTION

The defendant contends that he is entitled to suppression of the government's evidence against him because Providence Police officers conducted a Terry stop of the defendant without the requisite reasonable suspicion. The defendant is simply wrong. The defendant was not stopped, or "seized", for purposes of the Fourth Amendment until Officer Gregory Sion conducted a pat-down frisk for weapons. By this point in the defendant's encounter with police (and indeed, well before), the officers had ample reasonable suspicion that the defendant was involved in criminal activity, sufficient to justify an investigatory stop.

FACTS

On November 3, 2005, at approximately 4:30 PM, Providence Police Officers Gregory Sion and Thomas Zincone, patrolling in an unmarked car, observed several men hanging out in the parking lot at 615 Charles Street in Providence. The parking lot serves several stores, including a laundry. The parking lot is well known to the officers. Prior to November 3, 2005, Officers Sion and

Zincone had made drug arrests in this parking lot, and on several other occasions had dispersed persons from the parking lot because they suspected that those persons were involved in drug dealing. Furthermore, the neighborhood in which the parking lot at 615 Charles Street is located is known to the officers to be a high crime area - replete with incidents of drug dealing and gun crime.

As the officers approached the parking lot at 615 Charles Street in their unmarked car, they recognized one of the men in the parking lot as the defendant. Both officers knew the defendant; indeed, both officers had spoken to him in the past. The officers had received information in the past that the defendant was involved in drug dealing and other criminal activity,[1] and in recent days had received information from a Providence Police Detective that the defendant may have been involved in a recent shooting. When the officers first observed the defendant, two other men were with him. One was on a bicycle. The other, who was on foot, was Michael Moriarty. Officers Zincone and Sion had arrested Moriarty a few months before, for possession of drugs.

Officers Sion and Zincone pulled into the parking lot, parked, and got out of their car. Both officers were wearing T-Shirts bearing the words "PROVIDENCE POLICE", in large gold letters. The officers approached the men, including the defendant. At the sight of the officers, the man on the bicycle immediately pedaled out of the parking lot and down an adjacent street. Moriarty walked to the front of the parking lot, along the front of a store, around the corner, and down an adjacent street. The defendant, who had been walking toward the rear of the car parked in front of the store, made eye contact with Officer Sion, then turned and began walking in the other direction, toward the front of the car and the store.

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[1] On April 2, 2001, the defendant was convicted of drug trafficking in Providence County Superior Court (Case No. P2-2000-3605A), and sentenced to five years at the ACI, with eleven months to serve and forty-nine months suspended.

As Officer Sion walked toward the defendant, he called out words to the effect of, "Jamal, hold up." The defendant turned back to face Officer Sion, as Officer Sion continued to approach. The defendant appeared to be very nervous, and began to back away from Officer Sion. At this point, Officer Sion noticed a large bulge in the defendant's right front pants' pocket. Concerned that the large bulge might be a firearm, and correspondingly concerned for his and Officer Zincone's safety, Officer Sion quickly conducted a pat-down frisk of the defendant's right front pants' pocket, and immediately concluded that the bulge was a firearm. The defendant began to pull away from Officer Sion. Officer Sion, with Officer Zincone's assistance, took the defendant to the ground. After the defendant was placed in handcuffs, Officer Sion removed a loaded 9mm Highpoint semi-automatic pistol wrapped in a white tube sock from the defendant's right front pants' pocket. At

Providence Police Headquarters, after having been advised of his Miranda rights, the defendant gave a handwritten statement acknowledging possession of the firearm.

ARGUMENT

I. THE DEFENDANT WAS NOT "SEIZED" FOR PURPOSES OF THE FOURTH AMENDMENT UNTIL OFFICER SION CONDUCTED THE PAT-DOWN FRISK OF THE DEFENDANT.

The defendant argues that he was detained for Fourth Amendment purposes at the time Officer Sion "grabbed" him after he began to walk away from Officer Sion. According to the defendant, because the stop occurred at this point, nothing that occurred afterwards may be considered in determining whether the stop was supported by reasonable suspicion. The defendant is mistaken concerning when he was detained for Fourth Amendment purposes. The defendant was not "seized" for Fourth Amendment purposes until Officer Sion patted him down for weapons.

The Supreme Court has "repeatedly emphasized that not all personal intercourse between the police and citizens rises to the level of a stop or seizure." United States v. Young, 105 F.3d 1, 5 (1st Cir. 1997) (citing Florida v. Bostick, 501 U.S. 429, 434 (1991)). To establish that a seizure has occurred, triggering the Fourth Amendment, a defendant must first show that during his encounter with police, a reasonable person would not have felt free to leave. United States v. Sealey, 30 F.3d 7, 9-10 (1st Cir. 1994). But this alone is not enough. "[A] person's reasonable belief that he was not free to leave [i]s 'a necessary, but not sufficient condition for seizure.'" Id. at 9 (quoting California v. Hodari D., 499 U.S. 621, 628 (1991))(emphasis in original). A defendant must also establish either: (1) that the officer exerted physical force against him; or (2) that there was a show of authority by the officer and that the defendant submitted to it. Young, 105 F.3d at 6 ("[I]n the absence of an officer's exertion of physical force or an individual's submission to a show of authority, no seizure occurs."). Accord, United States v. Smith, 423 F.3d 25, 31-32 (1st Cir. 2005)("To constitute a seizure, there must not only be a show of authority sufficient to make a reasonable person believe that he was not free to leave, but also submission to that authority."); Sealey, 30 F.3d at 10 (with respect to a seizure based upon an officer's show of authority, "Hodari D. made it clear that no Fourth Amendment seizure occurs until a suspect submits to police authority.").

Here, at no time prior to Officer Sion's pat-down frisk for weapons did either Officer Sion or Officer Zincone exert any physical force against the defendant. At most, they made a show of authority: Officer Sion's words to the effect of, "Jamal, hold up." Yet this did not effect a seizure of the defendant, because he did not submit to that show of authority. Although the defendant turned back toward Officer Sion after Officer Sion told him to hold up, as Officer Sion approached, the defendant backed away. The defendant continued to back away as Officer Sion got closer, and it was at this point that Officer Sion, noticing the bulge in the defendant's right front pants' pocket, quickly conducted a pat-down frisk of this area. The defendant having failed to submit to Officer Sion's show of authority, it was only at this point, when Officer Sion placed his hands on the defendant to pat him down for weapons, that a seizure occurred. As set forth below, there can be no serious dispute that at this point (if not well before), there was ample reasonable suspicion supporting an investigatory stop of the defendant.

II. OFFICER SION'S SEIZURE OF THE DEFENDANT CONSTITUTED A VALID TERRY INVESTIGATORY "STOP" AND FRISK BASED UPON REASONABLE SUSPICION.

Pursuant to Terry v. Ohio, "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest." United States v. Trueber, 238 F.3d 79, 91 (1st Cir. 2001) (quoting Terry v. Ohio, 398 U.S. 1, 22 (1968)) (internal quotations and citations omitted). The officer may "stop and briefly detain the person for investigative purposes, and diligently pursue a means of investigation likely to confirm or dispel [his or her] suspicions quickly." Id. (internal quotations and citations omitted). To justify such a stop, "'the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion.'" United States v. Taylor, 162 F.3d 12, 17 (1st Cir. 1998)(quoting United States v. Kimball, 25 F.3d 1, 6 (1st Cir. 1994))(quoting Terry, 392 U.S. at 21). Put another way, "[w]arrantless investigatory stops are allowable if, and to the extent that, police officers have a reasonable suspicion of wrongdoing - a suspicion that finds expression in specific, articulable reasons for believing that a person may be connected to the commission of a particular crime." United States v. Lee, 317 F.3d 26, 31 (1st Cir. 2003) (citing Terry, 392 U.S. at 21). "A determination of whether [a] stop was justified at its inception depends on the totality of the circumstances confronting the officer." United States v. Trullo, 809 F.2d 108, 111 (1st Cir. 1987).

That a suspect's conduct may be ambiguous does not render a stop invalid; "Terry recognized that the officers could detain the individuals to resolve the ambiguity." Illinois v. Wardlow, 528 U.S. 119, 125 (2000). Indeed, "[i]n allowing such detentions, Terry accepts the risk that officers may stop innocent people." Id, 528 U.S. at 126. As the First Circuit has observed, "[t]he Supreme Court has 'looked favorably upon a practical, commonsense approach to the issue of reasonable suspicion.'" Taylor, 162 F.3d at 19 (quoting United States v. Sowers, 136 F.3d 24, 28 (1st Cir. 1998)). "The circumstances under which the officers acted 'are to be viewed through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training.'" Trullo, 809 F.2d at 112 (quoting United States v. Hall, 525 F.2d 857, 859 (D.C. Cir. 1976)).

Here, given the totality of the circumstances, Officer Sion's stop of the defendant was supported by "reasonable suspicion." First, the defendant was in a high crime area - known to the officers as one of drug trafficking and gun crime. Although an individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime, the Supreme Court has held that "officers are not required to ignore the relevant circumstances of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation." Wardlow, 528 U.S. at 124. Accordingly, "the fact that the stop occurred in a 'high crime area' [is] among the relevant contextual considerations in a Terry analysis." Id. Accord, Trullo, 809 F.2d at 111-12.

Second, the officers were aware of the defendant's involvement in drug trafficking and possible involvement in a recent shooting. This too is relevant to the reasonable suspicion analysis. As the First Circuit held in United States v. Kimball, "[a] police officer's knowledge of an individual's prior criminal activity is material to whether the officer reasonably suspects that criminal activity has or may be occurring." 25 F.3d 1, 7 (1st Cir. 1994).

Third, the officers observed the defendant in the company of a person they had arrested with drugs a few months before. This too is relevant to the reasonable suspicion calculus. United States v. Rogers, 2005 WL 478001, n.10 (D. Mass. 2005)(attached hereto as Exhibit A) (while not reaching the question, noting in dicta that "a good case" could be made that the officers there had reasonable suspicion to stop the defendant based, in part, on "his presence in the company of known gang members."); United States v. Coletraine, 2005 WL 1926607, *3 (W.D. Va. 2005)(attached hereto as Exhibit B)(officers had "a reasonable, articulable suspicion that criminal activity was afoot" based in part on his presence in an "'open air drug market,' in the company of a known drug dealer."). Given that the parking lot was known to the officers as the site of narcotics trafficking, the defendant's presence in that parking lot with a known possessor of narcotics gave rise to reasonable suspicion that criminal activity was afoot. If one sees a rug dealer in a rug market with someone known to have an interest in rugs, one might reasonably suspect that there is a rug somewhere about.

Fourth, the defendant's reaction upon seeing the officers, who were wearing T-Shirts emblazoned with the words, "PROVIDENCE POLICE", spoke volumes: he changed direction and began walking away. "Nervous, evasive behavior is a pertinent factor in determining reasonable suspicion." Wardlow, 528 U.S. at 124 (citing United States Brignoni-Ponce, 422 U.S. 873, 885 (1975));

Florida v. Rodriguez, 469 U.S. 1, 6 (1984); United States v. Sokolow, 490 U.S. 1, 8-9 (1989)). See also United States v. Franklin, 323 F.3d 1298, 1302 (11th Cir. 2003) (noting in dicta that "any kind of flight, even walking away, might support a finding of reasonable suspicion"). Furthermore, even after Officer Sion called to the defendant to hold up and the defendant turned back toward Officer Sion, as Officer Sion approached the defendant, he began to back away. Plainly, this nervous, evasive, and even threatening behavior is properly part of the equation in determining whether, at the time Officer Sion patted down the defendant for weapons, he had reasonable suspicion that the defendant was involved in criminal activity.

Fifth, it was not only the defendant who engaged in nervous, evasive behavior when the officers pulled into the parking lot at 615 Charles Street. Two of the men the defendant was with reacted precisely the same way. The man on the bicycle pedaled away. Moriarty, the known drug user, walked quickly away. Certainly, it was reasonable for the officers to consider the actions of the men the defendant was with in evaluating whether "criminal activity was afoot."

Sixth, as Officer Sion got approached the defendant, he saw a large bulge in the defendant's right front pants' pocket. Based upon his experience and training, in Officer Sion's opinion, the large bulge was consistent with a firearm.

In sum then, given that the defendant was in an area known for drug trafficking, given that the officers were aware of the defendant's involvement in the drug trade, given that the defendant was in the company of a person they had arrested previously for possession of narcotics, given the defendant's nervous, evasive behavior at the approach of police, given the nervous, evasive reaction of the men the defendant was with at the approach of the police, and given that the defendant had a large bulge in his right front pants' pocket consistent with a firearm, the investigatory stop of the defendant was amply supported by reasonable suspicion.

To the extent that the defendant challenges the constitutionality of Officer Sion's pat-down frisk of the defendant, that argument also goes nowhere. As the First Circuit has held, police officers "must be permitted to take measures . . . they believe to be reasonably necessary to protect themselves from harm, or to safeguard the security of others." United States v. Acosta-Colon, 157 F.3d 9, 18 (1st Cir. 1998). Accordingly, it is well-settled that police officers may frisk a suspect for weapons when they have a reasonable concern for their safety. "An officer is permitted to conduct a 'reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.'" Taylor, 162 F.3d at 20 (quoting Terry, 392 U.S. at 27). Accord, United States v. Moore, 235 F.3d 700, 703 (1st Cir. 2000)("generally, if officers have reason to believe that they are dealing with an armed and dangerous individual, they may take reasonable steps to protect themselves by frisking the individual for weapons"). Furthermore, "'[t]he officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or the safety of others was in danger.'" Taylor, 162 F.3d at 17 (quoting Terry, 392 U.S. at 27)(emphasis added). Indeed, the First Circuit has observed that "'it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties.'" Taylor, 162 F.3d at 18 (quoting Terry, 392 U.S. at 23).

There can be no serious dispute Officer Sion's actions meet this standard. As already noted, the defendant and his companions were in an area known for drug dealing and gun crime. The defendant was known to the officers as being involved in drug trafficking, and they had arrested one of his companions for possession of drugs. The First Circuit has repeatedly recognized that where a police officer suspects that an individual is involved in drug dealing, it is reasonable for that officer to believe that he may be dealing with an armed individual. United States v. Jackson, 918 F.2d 236, 240 (1st Cir. 1990)("law enforcement officers know from experience that firearms are often found in the presence of illegal drugs")(citing United States v. Walter, 904 F.2d 765, 769 (1st Cir. 1990)("in drug trafficking[,] firearms have become 'tools of the trade'")). And if this were not enough to raise a concern about firearms, the officers had received information from a Providence Police Detective that the defendant was suspect in a recent shooting.

There is still more. As the officers approached the defendant and his companions, all three men engaged in nervous evasive behavior. Two of the men took off, and the defendant continued to back away from Officer Sion as he approached. Finally, and perhaps most importantly, the defendant had a large bulge in his pants' pocket, consistent with a firearm. Certainly, under these circumstances, Officer Sion's suspicion that he was dealing with an armed individual was reasonable. United States v. Proctor, 148 F.3d 39, 42 (1st Cir. 1998)(officer's observation of bulge in suspect's jacket together with other circumstances indicating that suspect was "conceivably involved in illegal drug trafficking" "permitted reasonable inference that appellant was armed and dangerous"); Trullo, 809 F.2d at 113 (pat-down search justified where officers suspected that defendant had engaged in narcotics sale and where one officer noticed bulge in defendant's pocket). Accordingly, Officer Sion's pat-down search of the defendant for weapons, and recovery of the loaded firearm from the defendant's right front pants' pocket, passes constitutional muster.

CONCLUSION

For the reasons set forth above, the United States respectfully requests that the Defendant's Motion to Suppress be denied and dismissed.

Respectfully submitted,

UNITED STATES OF AMERICA

By its Attorneys,

ROBERT CLARK CORRENTE
United States Attorney

PETER F. NERONHA
Assistant U.S. Attorney

March 10, 2006

Certificate of Service

I hereby certify that on the 10th day of March 2006, I caused a copy of the within "Government's Memorandum of Law In Opposition to Defendant's Motion To Suppress" to be served on Kevin J. Fitzgerald, Esq., Assistant Federal Defender, 10 Weybosset Street, 3rd Floor, Providence, RI, 02903.